Filed 12/29/09 P. v. Curtis CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DENNIS JAMES CURTIS, Defendant and Appellant.	H034102 (Santa Clara County Super. Ct. No. CC815788)

Defendant Dennis James Curtis was convicted by plea of felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), being under the influence of cocaine (Health & Saf. Code, § 11550, subd. (a)), and felony possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)). On appeal he contends that his plea bargain contemplated a reduction of the first and third counts from felonies to misdemeanors. We agree that the plea appeared to be induced by an undertaking by the court to reduce the methamphetamine charge to a misdemeanor. We will therefore remand for resentencing.

BACKGROUND

According to the probation report, defendant, who is homeless, was sitting in his van when it was approached by San Jose police officers. The officers later reported that defendant seemed to try to hide something from them. He also seemed to be under the influence of an intoxicant. He told them that he was on parole for failing to register as a

sex offender, which he was apparently required to do by virtue of a 1980 Tennessee conviction the specific nature of which is not disclosed by the record. Defendant also had 15 prior felony convictions, including a "strike" based upon a 1996 assault upon his then-live-in-girlfriend.

Officers searched the van and found a torn plastic bindle on the floor and methamphetamine crystals in the carpet; these were collected and later weighed at 0.9 grams.[1] Police also found a box of .22-caliber ammunition in plain view on a rear passenger seat. Defendant denied to the officers that the methamphetamine was his, and later denied to the probation officer that he used that drug. Apparently defendant later told his attorney that he had acquired the van from his late father, who had left in it the ammunition for a firearm that was stolen during the father's ownership.

A felony complaint was filed August 22, 2008, followed by an information on December 24, 2008. As later amended, the information charged defendant with the three offenses previously mentioned, and alleged that he had sustained one strike prior and three prison priors.

As the matter came on for trial, the parties discussed a possible agreed disposition. These discussions apparently began off the record, with transcription commencing only

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[1] This figure may be a typographical error, since it does not seem consistent with the court's later view that only a minimal quantity was found. According to online sources, a typical dosage unit of methamphetamine is a "line" made up of 30 to 50 milligrams. Nine-tenths of a gram would yield 18 to 30 of such units. While this is not an enormous quantity—particularly in the possession of a heavy user—it would seem to be quite a bit more than the "residue" to which the court compared it. We suspect the probation officer misplaced the decimal point, and the actual quantity was 0.09 gram, which would appear to be about 2 to 3 lines, or perhaps even 0.009 gram, which would approach the "trace" mentioned by the court.

Defendant told officers that the methamphetamine belonged to a person described in the probation report as his "co-participant." He told the probation officer that he does not use any drugs other than cocaine, to which he acknowledged being addicted.

after the essential outlines of an agreement appeared to have been reached. In the transcribed proceedings, the prosecutor said that the "plan" was for defendant to "plead as charged" and then be "SORPed out of custody" (i.e., placed into the Supervised Own Recognizance Program) in about a month. At that time the defense would bring a *Romero* motion (see *People v. Romero* (1996) 13 Cal.4th 497) to strike the prior "strike" conviction. Defense counsel then added, "We talked in back about a *Romero*, and I think the court didn't specify what he would do with regard to any potential *Romero*, but did make some comments with regards to feelings about whether or not this was a state prison case or not. And I think the District Attorney has agreed that if for some reason the court's feelings about Mr. Curtis' *Romero* changes in some way at some time in the future, that at sentencing, if something comes up that wasn't known or expected by everyone here, that the People at that time would reduce these counts 1 and 3 to a misdemeanor." The court replied, "That was my understanding," but then said, "[A]ctually, it was my indication to you that I didn't see the case—if I granted the *Romero*, I didn't see the case as a state prison case. It should be a local case." The prosecutor expressed agreement with "that assessment."

The court then addressed defendant, asking whether he had discussed with his attorney the prosecution's burden of proof. Defendant said, "Well, I don't think—we just basically went through everything about what the prosecution would have to do, but my understanding was that the charges would be reduced to a misdemeanor and I would plead no contest to misdemeanor charges and the strike stricken." The court replied, "Okay. Well, what's going to happen is before the strike is stricken, you basically plead either guilty or no contest to the charges as they are at this point. Okay. At the time of the Romero hearing, then I make a ruling on whether the prior strike should be stricken or not. As I've indicated to counsel, without stating basically on the record that I would grant the motion, I thought it was a very good motion based upon your prior record and no violent activity since the last '96 strike prior or conviction. So I thought it was—I

thought it was a good *Romero*, you were in a good position to have the *Romero* granted. [¶] At that point, then I'm dealing with count 1, 2 and 3 without the strike prior. And, you know, I told counsel that I thought those were local cases; especially count 1, because of the amount. I thought it was appropriate that ought to be reduced to a misdemeanor. [¶] I'm not certain about count 3, but, in any event, it's not going to make any difference with regard to your sentence in the matter; whether it stays, and then it becomes a misdemeanor or felony, because I've indicated even if the ammunition violation stays a felony, it would be my indication or my intention at that point to still make it a local case, not going to state prison." Defendant thanked the court, and when asked whether he was "satisfied that [he understood] what the charges are and [he had discussed] any potential defenses," replied, "Well, now that you stipulated it, yes, I'm fine with that."

Shortly thereafter, during an exchange between court and counsel, defendant interjected, "Excuse me, Your Honor. I'm sorry to cut you off. [¶] One thing I didn't understand, Mr. Camp [defense counsel], and he explained that to me, but I didn't really get the full understanding of it. He said that if I plead no contest to these charges, that if you did not on the 27th, on the sentencing date, if you choose to make it a prison sentence instead of a county sentence, that I could withdraw my plea. Is that understanding correct?" The court replied, "Now, what's going to happen in that situation, Mr. Atterbury [the prosecutor] says at that point he'll reduce them both to a misdemeanor. [¶] THE DEFENDANT: Okay. [¶] THE COURT: So there's no way you could be sent to state prison on a misdemeanor. [¶] THE DEFENDANT: Thank you."

The court then undertook to explain to defendant the potential consequences of his plea. In the course of doing so, it stated, "Now, assuming for the moment that the *Romero* is granted, there's the possibility at that point that you'll be placed on probation. Assuming that—let's say, for example, count 3 still remains a felony count; one, because of the amount of the controlled substance, is reduced to a misdemeanor, even as a felony,

you could be placed on probation, probation could be for a period of up to five years." Defendant then entered pleas of no contest to each of the counts, with the court describing counts 1 and 3 as "felony violation(s)" and count 2 as a "misdemeanor violation." He also admitted the charged prior convictions. The court continued the matter to March 27 for sentencing and hearing on the *Romero* motion.

Defense counsel filed a written motion in which he asked the court to strike the strike prior or, in the alternative, "reduce the two felony counts to misdemeanors."

At the March 27 hearing the court gave a lengthy statement of its reasons for granting the *Romero* motion, including that count 1 involved "a very small amount of methamphetamine" that some would say "verges on residue." The court added that it was "certainly within the category that if the defendant didn't have a prior strike, or his prior record, it would most likely be a misdemeanor type offense." The court also recounted an earlier explanation by defense counsel for the ammunition at the heart of count 3: "[I]t's my understanding that the van that the defendant was in formerly belonged to the defendant's father. That there was a period of time where the defendant's father had a rifle in the vehicle. If I remember correctly, that rifle was stolen out of the vehicle. At some point the father had passed away. That's not to say that necessarily that Mr. Curtis wasn't aware of the ammunition in the vehicle, but, it certainly in my mind mitigates somewhat the situation, where it's a vehicle that's not his own, and he didn't appear that he went out looking for ammunition to hide or secrete in the vehicle." Based upon the relatively low severity of the offenses, the court granted the *Romero* motion.

The court then asked whether there was any legal cause not to impose sentence. Defense counsel requested a couple of corrections to the probation report, and alluded to a request by defendant for return of certain property, but said nothing about reducing either count 1 or count 3 to a misdemeanor. The court proceeded to place defendant on probation. Again it cited "the small amount of the controlled substance, almost, as I think I said before, almost the equivalent of residue, but a little more than that." With respect

to count 3, it said, “”[A]lthough ammunition was found, there were no guns, no rifles, anything to use the ammunition. So, the severity of the offenses involved in this case seem[ed] to be much less, under the circumstances, much less severe than most of the cases that they [*sic*] see involving these same type of offenses.”

The court suspended imposition of sentence and placed defendant on probation. It did not reduce either felony count to a misdemeanor; nor did defense counsel ask it to do so.

Defendant filed this timely appeal.

DISCUSSION

The case furnishes yet another illustration of the importance of identifying and addressing ambiguities in plea agreements when they are spread orally upon the record as was done here. It is possible that the attorneys and the court expected the two felony counts to remain as felonies unless the court *denied* the *Romero* motion, in which case the prosecutor would reduce them—or more accurately, seek their reduction—to misdemeanors. But defendant expressed, and sought confirmation of, a different understanding, namely, that the felonies would be reduced to misdemeanors in any event. Indeed a layperson could hardly be expected to comprehend an arrangement like the one first stated; we ourselves scarcely comprehend it. If the prosecutor was prepared to reduce the two felonies to misdemeanors, it is unclear why he did not simply do so, and spare all parties the trouble of a *Romero* motion—one to which, indeed, the prosecutor filed a 14-page opposition memorandum. The apparent effect of a bargain as first described above would be to make defendant *worse* off if the court *granted* the *Romero* motion than if it denied it. If by some labyrinthine calculus this made sense to one of the parties, defendant could hardly be expected to see it.

In any event defendant expressed the understanding that, as part of the bargain, the felonies would be reduced to misdemeanors. Either of the attorneys in the courtroom, or the judge, could easily have dispelled this belief by saying, “They will only be reduced if

the *Romero* motion is denied; if it is granted, they will remain felonies, but you will be placed on probation." Instead the court seemed to *confirm* defendant's understanding, at least as to count 1 (possession of methamphetamine). Discussing a hypothetical sentencing in which the *Romero* motion had been granted, the court said, "At that point, then I'm dealing with count 1, 2 and 3 without the strike prior. And, you know, I told counsel that *I thought those were local cases; especially count 1, because of the amount. I thought it was appropriate that ought to be reduced to a misdemeanor.* [¶] I'm not certain about count 3, but, in any event, it's not going to make any difference with regard to your sentence in the matter; whether it stays, and then it becomes a misdemeanor or felony, because I've indicated *even if the ammunition violation stays a felony*, it would be my indication or my intention at that point to still make it a local case, not going to state prison." (Italics added.) The plain implication of these statements was that the court *would* reduce at least count 1, and perhaps count 3 as well, to a misdemeanor. Defendant explicitly relied upon these statements, saying he was "fine" with the agreement "now that you stipulated it."

Respondent offers no alternative construction of this exchange. Indeed it does not acknowledge this exchange at all. It simply asserts that the agreement required only that "the prosecutor would reduce the felonies to misdemeanors should the trial court fail to grant the expected defense motion to dismiss the strike prior." That was indeed part of the understanding as conveyed to defendant. But the court's remarks would suggest to a reasonable person the further proviso that count 1 *would* be reduced to a misdemeanor, and count 3 *might* be reduced to a misdemeanor, whether or not the *Romero* motion were granted.

It seems to us that the only question is whether the court's assurances are properly treated as part of the plea agreement, or as erroneous advisements concerning the consequences of the plea. We recognize that insofar as the assurances came from the court rather than the prosecutor, they were not *ipso facto* binding upon the state. (See

People v. Smith (1975) 53 Cal.App.3d 655, 658 [“ ‘[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of “plea bargaining” to “agree” to a disposition of the case over prosecutorial objection.’ ”]; *People v. Orin* (1975) 13 Cal.3d 937, 943; *People v. Segura* (2008) 44 Cal.4th 921, 930.) However the court was not purporting to act, or even to speak, on behalf of the state, but expressing its understanding of the agreement the parties had themselves reached. The prosecutor sat mute while these assurances were made and while defendant voiced his explicit reliance on them as an expression of the agreed disposition. Under these circumstances we believe the court’s assurances were enforceable terms of the plea bargain.

Defendant devotes considerable attention to the question whether the objection has been preserved for appeal and, more particularly, whether counsel rendered ineffective assistance by failing to ask the court at sentencing to reduce the felonies to misdemeanors. Respondent does not contend that the issue has been forfeited, and opposes the claim of ineffective assistance only on the grounds that the sentence imposed conformed to the plea bargain, and the court was not likely to reduce the charges. We have already rejected the first proposition. Nor can we adopt the second. The court made quite clear that it felt both charges were quite minor by comparison to other similar charges and that neither would be viewed as a felony if not for defendant’s extensive record.[2] As we have said, the court expressed its intention to reduce at least count 1 to a misdemeanor. We conclude that the court’s failure to sentence in accordance with the plea agreement is remediable on this appeal.

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[2] Nor is it possible to dispute this characterization. So far as the record shows, defendant “possessed” the methamphetamine only in the sense that it was found in a place subject to his control. The same appears to be true of the ammunition, though he may also have *owned* it by some technical process of inheritance or accession to abandoned property.

We turn to the question of remedy. In cases not involving restitution fines, failure to sentence in conformity with a plea bargain generally entitles the defendant "to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861.) There is no suggestion that defendant here should be permitted, or would wish, to withdraw his plea. The appropriate remedy therefore appears to be specific enforcement. "When the breach is a refusal by the court to sentence in accord with the agreed upon recommendation, specific enforcement would entail an order directing the judge to resentence the defendant in accord with the agreement." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 13.)

DISPOSITION

The judgment is reversed for resentencing with directions to reduce count 1 to a misdemeanor and to determine, in an exercise of the court's discretion, whether to reduce count 3 to a misdemeanor.

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RUSHING, P.J.

WE CONCUR:

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ELIA, J.

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DUFFY, J.